

JAN 12 2006US v. Leyva-Franco, 04-10430

KLEINFELD, Circuit Judge, Dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I dissent.

This defendant smuggled five kilograms or more of cocaine across the border. His sentence is around half of what similarly situated defendants ordinarily get. This case has come up on appeal twice before. Both times we vacated the sentence and mandated resentencing with findings. The district court has not complied with our mandate.

We held in a published opinion that the district court had to make a finding of fact as to whether it was true or false that the defendant had admitted smuggling drugs across the border before. The district court has still not made the finding. In its most recent iteration, the district court said in substance that it would not matter.

This is unsatisfactory for two reasons. First, it defies the mandate. When a case is remanded for resentencing, a district court has an absolute duty to comply

with any instructions by the court of appeals.¹ Second, the burden is on the defendant to show that his behavior is aberrant, and he has not done so.

When this same district judge did substantially the same thing, imposing the same sentence three times in the face of repeated reversals, in United States v. Atondo-Santos², we reversed and remanded with directions pursuant to our supervisory power under 28 U.S.C. § 2106 that the case be reassigned to a different district court judge. Like cases ought to be treated alike. We should do the same thing in this case.

¹ See 18 U.S.C. § 3742(g).

² United States v. Atondo-Santos, 385 F.3d 1199 (9th Cir. 2004).